Supreme Court, U.S.
FILED

No. : 06-319

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In the

Supreme Court of the United States

EDWIN FERNANDEZ,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNTITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

A. Whether the conscious avoidance charge given to the jury by the trial judge in a specific offense case was improper in that it lowered the burden of proof to a negligence standard in a case involving a Title 18 United States Code §1956(3)(A) prosecution and therefore denied the Petitioner a fair trial as guaranteed by the due process clause of the Fifth Amendment of the Constitution.

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

EDWIN FERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Edwin Fernandez respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (McLaughlin, Jacobs and Parker J.J.) is unreported. A copy of the decision is reproduced is Appendix A herein.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 2006. The jurisdiction of this Court is invoked under 28 United States Code §1254(1) and Rule 12 and 13 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provision

The Fifth Amendment of the United States Constitution.

B. Statutory Provision

Title 18 United States Code §1956 (3)(A).

The pertinent text of the foregoing provisions are set forth in Appendix B hereto.

STATEMENT OF THE CASE

INTRODUCTION

The petitioner, Edwin Fernandez, seeks certiorari in relation to a judgment of conviction entered on June 6, 2005, in the United States District Court for the Southern District of New York (Hon. Robert P. Patterson, Jr., U.S.D.J.) on five counts of a seven count indictment alleging money laundering in violation of Title 18 U.S.C. § 1956(3)(A).

The petitioner was charged in a seven count Indictment. Each of the seven counts charged the petitioner with conducting financial transactions involving property represented to be the proceeds of some specified unlawful activity, namely, narcotics trafficking.

The Government's case was the result of a sting operation involving a single informant. Despite expert testimony concerning financial reporting requirements, the Government *sua sponte* dismissed that portion of the indictment just prior to summation.

At the conclusion of the trial, the jury acquitted the petitioner on the first two counts of the indictment, and convicted on the remaining five counts.

On June 6, 2005, Hon. Robert P. Patterson, Jr., United States District Judge for the Southern District of New York, sentenced the petitioner to sixty-six months imprisonment and three years supervised release, concurrent on all five counts; a special assessment in the sum of Five Hundred Dollars; and a forfeiture of Two Hundred Ninety Five Thousand ($295,000.00) Dollars, plus interest.

The petitioner has commenced serving his sentence at a federal correctional facility.

Petitioner, by direct appeal to the United States Court of Appeals for the Second Circuit sought reversal of his conviction. The Court of Appeals (McLaughlin, Jacobs, Parker, J.J.), in an unpublished summary order affirmed the petitioner's conviction.

The District Court's subject matter jurisdiction was derived from 18 U.S.C. §3231(A), and is based upon the petitioner having been tried for a crime arising under the laws of the United States.

The Court of Appeals' jurisdiction was invoked under 28 U.S.C. §§ 1291, 1294(1) and 18 U.S.C. Section 3742(a). Petitioner having filed a timely Notice of Appeal on June 9, 2005.

BACKGROUND

In 2002 petitioner, Edwin Fernandez, had worked with his father, Nicolas, at two booths they leased at 37 West 47th Street, inside a larger building. The business was called "Nicolas Refiners Inc.", as indicated by the sign at the entrance. The business specialized in buying, selling and refining gold and other precious metals. The booth was open to the public.

In September of 2002, law enforcement agents requested that an informant, Alexandra Calderon, purchase bulk gold from Nicolas Refiners. Prior to having been taken

to Nicolas Refiners, the informant, Calderon, had never heard of or met petitioner, Edwin Fernandez.

During the course of the next eight months, the informant bought bulk gold, in packages labeled by the refiners who supplied Edwin Fernandez. The profit to Nicolas Refiners would be approximately $5.00 an ounce over market, or just in excess of $150.00 per kilogram of gold.

During that eight-month period the informant, Calderon, began to mention that she had "Colombian" connections, and made other veiled references to the source and purpose of the money. The issue then, at trial, was whether the petitioner had specific knowledge that the money received from the informant was from Colombian drug smuggling, and that the gold purchase was made for the purpose of money laundering for a Colombian drug organization.

The jury acquitted petitioner of the first two transactions, but found him guilty of the remaining charges.

TRIAL TESTIMONY

The first witness was Special Agent Walter Rivera of the Bureau of Immigration and Customs Enforcement ("I.C.E."). He testified he had worked for U.S. Customs and was currently assigned to the "Eldora" [sic] (Eldorado) Task Force, specializing in "money laundering investigations, related to narcotics trafficking" Although the agent was not qualified as an expert, Rivera was permitted to testify to definitions of "narcotics money laundering", over defense counsel's objection. He further testified that in his investigation of petitioner, Edwin Fernandez, he was a "project manager" and "co-case agent."

Special Agent Rivera was then permitted to provide the "basic structure" of his investigation "into petitioner, Edwin Fernandez." Specifically, with regard to his use of the informant, he told the jury, "I'm in a sense her keeper,

you know, watching over her,...making sure she performs those activities correct and reports back to me," in essence vouching for the informant.

Special Agent Rivera then testified to his surveillance of the informant as she went to Nicolas Refiners, and her use of a recording device. His testimony was also used to introduce the recordings and the packages of gold purchased from petitioner. As a demonstrative exhibit, a sample package of $10,000 was submitted to the jury. Agent Rivera testified the package was prepared in the same fashion as "drug money."

In a similar vein, Special Agent Lisa Franchini testified she worked with the Department of Homeland Security, Bureau of Immigration and Customs Enforcement, a member of "the Eldorado Task Force" and a co-case agent. She also participated in surveillance of the informant. Her testimony introduced recordings, gold, and several pieces of paper received from the informant.

The two "expert" witnesses at trial were Special Agent Brendan Clarke of the Internal Revenue Service Criminal Investigation Division, and Cecilia Gardner, a former Assistant United States Attorney for 18 years, who had an expertise in prosecuting money laundering cases.

Directly after the "experts" finished testifying, the prosecution called Special Agent Keith Krayewski of the United States Treasury Department, Internal Revenue Service Criminal Investigation Division.

The informant, Alexandra Calderon, was next called to testify. Calderon had been actively engaged in money laundering since 1998. She began buying gold and eventually acted as a courier of the gold to Colombia. Calderon testified that she had never heard of or met with the petitioner previously. Nor had the government agents told her to meet with the petitioner. Rather, on September 13, 2002, the agents took her to Nicolas Refiners, where she met with petitioner's father. Petitioner's father directed Calderon

to his son when she inquired about purchasing gold bullion because his father was not in the wholesale gold business. Significantly when she met with the petitioner to discuss the purchase of gold bullion, at no time did the informant explicitly state the gold was in exchange for Colombian drug money. Since the informant had an interest in not alarming the petitioner, she was deliberately cryptic and vague.

REASONS FOR GRANTING THE WRIT

The Writ should be granted in order to provide guidance to the Circuit Courts on the issue of whether a conscious avoidance charge should be permitted in cases involving an alleged violation of Title 18 United States Code §1956(3)(A) which statute requires knowledge of a specified unlawful activity, rather than knowledge of some unspecified unlawful activity. A conscious avoidance charge that instructs that no explicit representation is necessary regarding the unlawful activity by government agents conflicts with the statute's requirement that the government prove that a defendant had knowledge that he was engaging in a particular and specific unlawful activity.

POINT A

IT WAS ERROR FOR THE TRIAL COURT TO CHARGE CONSCIOUS AVOIDANCE AND THEREFORE DEPRIVED THE PETITIONER OF HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

It is submitted that the trial court improperly gave the conscious avoidance charge. It is further submitted that the conscious avoidance charge was improper, when given in combination with the court's other charges. In that respect,

the court had also charged that the Government did not have the burden of proving that the informant made express statements that the proceeds were from narcotics trafficking in order to establish the petitioner's knowledge and belief.

In addition, the court instructed that the second element, as to the petitioner's belief would be satisfied if the jury found that a "reasonable person" under those circumstances would infer the proceeds were from narcotics trafficking. Finally, the court instructed the jury that if it found conscious avoidance it was to consider it as deliberate avoidance,

> ***unless you find the defendant actually believed the funds were <u>not</u>*** the proceeds of narcotics trafficking or that the purpose of the transactions were not to conceal the nature, source or ownership of the funds transmitted. (emphasis added)

The obvious improper effect of these charges to the jury was that it could find the Government had proved that element of the offense by a negligence standard rather than beyond a reasonable doubt standard. Moreover, giving the "reasonable person" instruction, which defense counsel had requested be stricken from the charge, was akin to giving the conscious avoidance charge twice. Finally, the court shifted the burden of proof to the petitioner, by requiring that the petitioner prove that he actually believed it was ***not*** narcotics transactions or that he intended to conceal. As such, the charge was erroneous and requires reversal of the conviction.

A conscious avoidance instruction may only be given if (1) the defendant asserts the lack of some specific aspect of knowledge required for conviction, and (2) the appropriate factual predicate for the charge exists, i.e. that a rational juror could find beyond a reasonable doubt that the defendant was aware of a high probability [of the fact in

dispute] and consciously avoided confirming that fact. United States v. Ferrarini, 219 F.3d 145, 154 (2d Cir. 2000) Unless these two requirements are satisfied, the instruction should not be given. Id. The defendant must be shown to have ***decided*** not to learn the key fact, not merely to have failed to learn it through negligence.

In this case, the judge failed to make such factual findings with respect to the Government's evidence in deciding whether the charge should properly be given, nor did such a basis exist. The Government argued throughout its case and in summation, that the petitioner had actual knowledge that the proceeds were derived from narcotics trafficking. There was no foundation whatsoever for the charge, nor did the court attempt to establish one. As aptly stated in Ferrarini,

> [I]f conscious avoidance could be found whenever there was evidence of actual knowledge, **a jury could be given a conscious avoidance instruction in a case where there was only equivocal evidence that the defendant had actual knowledge and there was no evidence that the defendant deliberately avoided learning the truth.**

Id., at 157. (emphasis added)

The Court reasoned that under those circumstances the danger exists that a jury might convict, even if it concluded there was no actual knowledge, because the defendant did not try hard enough to learn the truth. The Court reaffirmed the principle that conscious avoidance cannot be established when the factual context ***should have apprised*** the defendant of the unlawful nature of his conduct, rather than showing the defendant ***decided*** not to learn the key fact.

The Government's argument in this case, as highlighted repeatedly in its summation, is that the evidence ***should have apprised*** the petitioner that the proceeds were from drug activity, not that he deliberately avoided confirming that fact. It emphasized that the informant's veiled references in their conversations should have put the petitioner on notice that he was involved with proceeds derived from narcotics trafficking.

It should be emphasized that 18 U.S.C. §1956 (3)(A) requires that the petitioner ***believe*** that the proceeds were from a ***specified*** unlawful activity, i.e. in this case narcotics trafficking, not just ***any*** unlawful activity. Based on the circumstances in this case, given the charge and the prosecution's summation, there is a substantial likelihood that the jury found this element was satisfied based on the erroneous conclusion that petitioner should have known something was amiss, or that he had knowledge that he was money laundering in general, as opposed to a ***specific*** finding that petitioner actually believed he was laundering proceeds derived from narcotics trafficking.

The cases where the Second Circuit has upheld the use of a conscious avoidance charge, generally are distinguishable from the case at bar. In those cases the defendant concededly possessed an item, but denied knowledge of the illegal content or use of the item, see, e.g., United States v. Rodriguez, 983 F.2d 455 (2d Cir. 1993)[charge appropriate where defendant denied knowledge of four pounds of cocaine concealed in lining of suitcase that she allegedly purchased at flea market]; United States v. Booth, 994 F.2d 63 (2d Cir. 1993) [charge appropriate where defendant who picked up cartons of paper for use in counterfeit operation denied knowledge of operation], or was present at an illegal transaction, United States v. Dozier, 522 F.2d 224 (2d Cir. 1975)[charge was proper where defendant was never seen with narcotics, and claimed she innocently

accompanied her companion without knowledge that companion was selling narcotics].

Simply stated, there was no evidence presented here that supported the factual predicate necessary to giving the conscious avoidance charge. Clearly, the Government did not believe the charge was appropriate because it was not requested until the trial judge raised the issue.

In its submission to the court of 5/26/04, requesting the charge, the Government relied heavily on United States v. Aliotta, 1998 U.S. Dist. LEXIS 905, No. 97 Cr. 311, 1998 WL 43015 (S.D.N.Y. Feb. 3, 1998)(Scheindlin, J.) a case that is clearly distinguishable from this case. In Aliotta, the defendants were charged with money laundering (18 U.S.C. §1956(3)(A)) as well as conspiring to launder narcotics trafficking proceeds (18 U.S.C. §1956(h)). Unlike this case, which does not involve a §1956(h) conspiracy charge, the charge in Aliotta, stated that the Government did not need to prove that the conspirators agreed that the cash laundered was specifically from narcotics.

In striking contrast to this case, in Aliotta there were numerous explicit representations made to the defendant that the cash being laundered was derived from narcotics trafficking, e.g., "drug money", "dope money" and conversations concerning "moving" heroin and cocaine. Aliotta, at *5. Clearly, there was overwhelming evidence that the defendant did in fact have knowledge that the proceeds being laundered were specifically derived from narcotics, thereby rendering the charge meaningless, even if it was erroneously given. Here, there were no explicit representations made to the petitioner by the informant that the cash was from narcotics trafficking, and therefore the impact of a conscious avoidance charge was significant.

In light of the fact that the Second Circuit has expressly reserved judgment on the issue of explicit representation concerning the specific unlawful activity in §1956(3)(A) cases, the giving of the conscious avoidance

charge was improper. See, United States v. Wydermyer, 51. F3d 319, 327-28 (2d Cir. 1995)[whether a representation that an individual is involved in a specified illegal activity for which he needs money laundered sufficiently conveys that the money is derived from that activity is a fact-specific determination].

Significantly, in Aliotta, unlike the instant case, the defense had not raised an objection to the charge, and the court was applying a stringent plain error standard.

It should also be noted that in seeking a last minute conscious avoidance charge, the Government failed to bring to the trial court's attention a more recent case by Judge Scheindlin, United States v. Tunick, 2001 U.S. Dist. LEXIS 2911, No. S3 98 CR 1238 (S.D.N.Y. March 22, 2001), where the court granted the defendant bail based upon a finding that the jury instruction on conscious avoidance raised a substantial question of law, that was likely to result in reversal or a new trial.

Notably, in Tunick the court found that in light of the fact that there was "some proof" of actual knowledge, in combination with the Government's argument that the defendant made a deliberate decision not to confirm the illegality, the decision whether to give the conscious avoidance charge was a "close question." Id., at *8. In doing so, the court relied heavily upon Ferrarini, quoting extensively from that decision. The court went on to find that because the conscious avoidance charge went to all counts of conviction, the error, if it were found by the appellate court, would not be harmless. Id., at *9.

In reaching its decision, the court in Tunick also emphasized that the issue had been preserved by defense counsel, obviating the much more stringent plain error standard of review. Judge Scheindlin further noted that unlike Tunick, the defendant in the case relied upon by the Government had testified at trial, placing his knowledge

squarely in issue. See generally, United States v. Civelli, 883 F.2d 191 (2d Cir. 1989).

In this case, as defense counsel argued, the error in giving the conscious avoidance charge was further compounded by the additional charge that the second element of the crime was satisfied if the jury concluded that a "reasonable person" would infer from the circumstances that the proceeds were from narcotics trafficking. Clearly, the unfortunate effect was that of reducing the Government's burden of proof to a simple negligence standard.

It is submitted that in the peculiar facts and circumstances of this case, where no explicit representation was made; where the petitioner had no knowledge of the informant's criminal background or involvement in narcotics trafficking, see, e.g., United States v. Monaco, 1999 U.S. App. LEXIS 26869, No. 98-1386 (2d Cir. 1999)[factual predicate satisfied for willful blindness charge because defendant had knowledge of co-defendant's history of drug trafficking, multiple arrests and prison terms]; where the petitioner did not testify at trial, thereby placing his knowledge squarely in issue; where there was a "reasonable person" inference charge concerning the petitioner's knowledge, in addition to the conscious avoidance charge; and most importantly, where the trial court did not make a finding that the factual predicate was satisfied in reaching its decision to give the conscious avoidance charge, it was clearly erroneous to charge the jury concerning conscious avoidance thereby depriving the petitioner the right to a fair trial as guaranteed by the Fifth Amendment of the United States Constitution.

CONCLUSION

WHEREFORE, it is respectfully requested that this Court issue a Writ of Certiorari to review the judgment and opinion of the Second Circuit Court of Appeals in this matter.

Dated: Brooklyn, New York
August 31, 2006

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5th day of June, two thousand and six.

PRESENT: HON. JOSEPH M. MCLAUGHLIN,
HON. DENNIS JACOBS,
HON. BARRINGTON D. PARKER,

Circuit Judges,

----------X

UNITED STATES OF AMERICA,

Appellee,

No. 05-3306-cr

-v.-

EDWIN FERNANDEZ,

Defendant-Appellant.

----------X

APPEARING FOR APPELLANT:

BARRY F. SCHULMAN, Brooklyn, NY,
for Defendant-Appellant.

APPEARING FOR APPELLEE:

JONATHAN R. STREETER, Assistant United States Attorney (Michael J. Garcia, United States Attorney for the Southern District of New York, of counsel, Kevin R. Puvalowski, on the brief), for Appellee.

Appeal from a judgment of the United States District Court for the Southern District of New York (Patterson, J.), entered June 10, 2005, convicting defendant of five counts of money laundering.

UPON DUE CONSIDERATION, it is **ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

Edwin Fernandez appeals his conviction on five counts of money laundering in violation of 18 U.S.C. § 1956(3). We assume familiarity with the facts, the procedural history, and the issues on appeal.

1. Fernandez argues that the district court erred by charging the jury on "conscious avoidance". "We review a claim of error in the jury instructions de novo, reversing only where, viewing the charge as a whole, there was a prejudicial error." United States v. Aina-Marshall, 336 F.3d 167, 170 (2d Cir. 2003). The district court did not err if "the evidence piesented permitted a rational juror to conclude beyond a reasonable doubt that [Fernandez] was aware of a high probability" that the money used to buy gold from him was derived from proceeds of illegal narcotics trafficking, and

that Fernandez "consciously avoided confirming that fact." See United States v. Jacobs, 117 F.3d 82, 98 (2d Cir. 1997) (internal quotation marks omitted). In this regard, "[Fernandez's] claim is little more than a challenge to the sufficiency of the evidence to support a conscious avoidance conviction." Aina-Marshall, 336 F.3d at 171.

There was sufficient evidence to support a conscious avoidance charge. Based on the following evidence, a rational juror could conclude that Fernandez was aware of a high probability that the purchase money flowed from narcotics trafficking: (1) Fernandez's insistence on using code words; (2) Fernandez's demand that all conversations be conducted in private; (3) Fernandez's ready appreciation of his customer's desire to have gold "painted" even though there is no reason to paint gold in legitimate transactions; and (4) the above-market premiums extracted by Fernandez in his sales to the government informant. Likewise, sufficient evidence--such as Fernandez's insistence on using code and his affirmative rejection of information about the source of the funds--supports an inference that Fernandez deliberately avoided confirming the source of the funds. The factual predicates for use of the conscious avoidance charge were therefore satisfied, and the district court did not err in imposing the charge.

2. "We review the district court's decision to admit or exclude expert testimony for an abuse of discretion. "United States v. Cruz, 363 F.3d 187, 192 (2d Cir. 2004) (internal quotation marks omitted). Expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Fernandez challenges some expert evidence as overly prejudicial; the district court should only exclude such evidence "if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Fed. R. Evid. 403.

The district court acted within the scope of its discretion. Agent Clarke's testimony provided background information on money laundering and thereby helped the jury understand why gold is useful to money laundering; Fernandez has identified no serious countervailing prejudice. Cecilia Gardner's testimony assisted the jury's determination of whether gold sold by Fernandez had traveled in interstate commerce, and helped the jury understand the significance of the request to "paint" gold. Fernandez has identified no serious countervailing prejudice co Gardner's testimony: Gardner gave minimal treatment to her history as a prosecutor. Likewise, Agent Rivera, Agent Krayewski, and Alexandra Calderon all provided useful background information that was not overly prejudicial. Accordingly, the district court did not abuse its discretion in admitting the challenged testimony.

3. Fernandez challenges the sufficiency of the evidence showing a nexus with interstate commerce. Where an appellant challenges sufficiency of the evidence, we affirm so long as "any rational trier of fact could have found the essential element[] of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). Here, the uncontroverted testimony of Cecilia Gardner--explaining that all gold sold in New York State is produced out of state-sufficiently demonstrated a nexus with interstate commerce.

For the foregoing reasons, the judgment of the district court is affirmed.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK

By: Lucille Carr

Lucille Carr, Deputy Clerk

Appendix B

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix C

§ 1956 Laundering of Monetary Instruments

* * *

(3) Whoever with the intent-

(A) to promote the carrying on of special unlawful activity; conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both.

* * *

(c) As used in this section-

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form.

thought not necessarily which form, of activity that constitutes a felon under State, Federal, or foreign law regardless of whether or not such activity is specified in paragraph(7);